

# IMPLICATIONS FOR REAL ESTATE: AN OVERVIEW



## HIGHLIGHTS

- The PPSA introduces a completely new national regime for registering security interests in personal property with an “in substance” test for determining if a registrable security interest exists.
- The PPS Register is an online, electronic noticeboard; it is not document-based.
- Registration of “in substance” security interests on the PPS Register will help protect the priority of those security interests and preserve them in an insolvency of the grantor.
- New PPSA concepts include “attachment”, where security interests cannot be enforced unless they are successfully “attached” to the relevant personal property, and “perfection”, which can be achieved by registration of the security interest or, in some cases, by possession or control of the relevant personal property.
- Property dealings may be affected by the PPSA by way of financing arrangements, and the broader “in substance” test may capture various aspects of property dealings.





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### **Real property and the PPSA**

Although the PPSA expressly excludes dealings in land, fixtures or “real property”, certain aspects of real estate transactions may nonetheless be caught by the regime, largely due to the way in which those transactions are generally handled. Whilst mortgages and charges over land will remain unaffected, the PPSA may impact upon dealings with real property in two broad areas:

- (a) by impacting on traditional financing arrangements where interests in both real property and other property are secured by fixed and floating charges (which will now be replaced by general security agreements), bills of sale, goods mortgages or crop mortgages; and
- (b) by broadening the ambit of “security interests” with the adoption of a functional “in substance” test. As a result, the PPSA captures a number of dealings which previously were not considered security arrangements. These include:
  - (i) securing a landlord’s contractual rights in a premises fitout;
  - (ii) a mortgagee’s interest in rent under a lease and insurance proceeds;
  - (iii) retention of title arrangements;
  - (iv) equipment leasing;
  - (v) bailment agreements; and
  - (vi) agricultural PMSIs (see further below).

Standard contractual provisions in joint venture agreements, mortgagee tripartite deeds and shareholder agreements may also constitute security interests, giving a party rights in collateral, and would thus need to be registered to ensure priority under the PPSA scheme. These include:

- (i) step-in rights; and
- (ii) pre-emptive rights, eg dilution on default clauses.

### **Purchase money security interests (PMSIs - say “pimzees”)**

The PPSA introduces a new concept known as a “purchase money security interest” (PMSI) say “pimzees”. This is a form of security interest which includes any of the following:

- (a) a security interest taken in collateral, to the extent that it secures all or part of its purchase price;
- (b) a security interest taken in collateral by a person who gives value for the purpose of enabling the grantor to acquire rights in the collateral, to the extent that the value is applied to acquire those rights;
- (c) the interest of a lessor or bailor of goods under a PPS lease; and
- (d) the interest of a consignor who delivers goods to a consignee under a commercial consignment.

A PMSI has “super priority” under the PPSA scheme. It will usually have priority ahead of all other security interests in the same collateral, including banks and other secured parties holding security interests over all or substantially all of the property of the grantor.



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### **The New PPSA Regime**

The PPSA introduces a national regime which completely replaces existing schemes for the registration of security interests over personal property in Australia.

Central to the PPSA is the concept of the “security interest”. A security interest is defined by s 12(1) as “an interest in personal property provided for by a transaction that, in substance, secures payment or performance of an obligation (without regard to the form of the transaction or the identity of the person who has title to the property)”.

Fundamental changes introduced by the PPSA include:

- (a) the establishment of a regime for the protection of “security interests” in personal property, and for the regulation of priorities between competing security interests in that property;
- (b) the establishment of a national online register, which operates as a “noticeboard”, consisting of online notification of security interests; and
- (c) the replacement of the concept of fixed and floating charges with “general security agreements” which provide security over a grantor’s “all present and after-acquired property”.

### **Key concepts: attachment and perfection**

- (a) The PPSA provides that a security interest in personal property cannot be enforced until the interest has “attached” to the relevant property. The requirements for attachment are set out in s 19(2) of the PPSA. Essentially, attachment occurs where (a) the grantor has rights in, or power to transfer rights in, the collateral to the secured party, and (b) value is given in exchange for the security interest, or the grantor “does an act by which the security interest arises”.

Upon attachment, the security is enforceable against the grantor.

The default priority rules in s 55 provide that priority between unperfected security interests in the same collateral is to be determined by the order of attachment of the security interests. Thus, attachment is essential for protection and priority of security interests.

- (b) The PPSA introduces the concept of “perfection” of a security interest. Perfection is vital to priority. While it doesn’t guarantee priority, it gives the security interest priority over unperfected interests in the same collateral. Also, a security interest which is unperfected will not be enforceable if the grantor becomes insolvent.

The main requirements for perfection of a security interest are set out in s 21. Essentially, a security interest will be perfected where (a) it has attached to the collateral, (b) it is enforceable against a third party, and (c) it has been registered effectively on the PPS Register or the secured party has possession (or in some cases, control) of the collateral.



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### Registration

The most fundamental change introduced by the PPSA is the requirement that security interests be registered on the PPS Register to attain “perfection”. Whilst an unregistered security interest is still valid (subject to some exceptions in the context of insolvency), it risks losing priority. Thus, it will be prudent to register a security interest granted under a form of general security agreement in order to properly protect that security interest.

A number of factors will be relevant when considering whether or not to register a security interest, including the duration of the security interest, the nature and financial strength of the grantor and the amount secured by the security interest in comparison to the net worth of the security holder.

Importantly, a security interest will be extinguished on the appointment to the grantor of a liquidator or administrator or the entry into a deed of company arrangement if the security interest is either unperfected (as noted above), or is not registered within 20 business days from the date it is created (subject to additional factors). Ideally therefore, registration should occur as soon as the grantor agrees to grant the interest.

Note that no documents will be lodged with the PPS Register, which operates merely as an online “noticeboard” of the granting of security interests.

### Enforcement of “mixed securities”

The PPSA recognises that land is often dealt with in conjunction with other types of property. Where a security interest in personal property and an interest in land both secure the same obligation, section 118 of the PPSA allows the security holder to elect to enforce its security interest in the personal property by applying the enforcement laws that apply to the land in the relevant state or territory.

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### CONTACTS



**Shane Martins**  
Partner

T +61 2 9947 6322  
E shane\_martins@hdy.com.au



**David Ireland**  
Special Counsel

T +61 2 9947 6463  
E david\_ireland@hdy.com.au

#### SYDNEY

44 MARTIN PLACE SYDNEY NSW 2000 AUSTRALIA  
T +61 2 9947 6000 F +61 2 9947 6999

#### BRISBANE

324 QUEEN STREET BRISBANE QLD 4000 AUSTRALIA  
T +61 7 3087 5000 F +61 7 3087 5099